

***United States Court of Appeals
for the Second Circuit***



APPENDIX

13
PA 5
75-1206

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

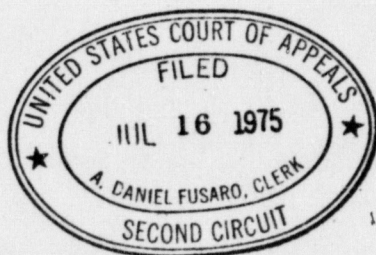
WILLIE WILLIAMS,

Appellant.

Docket No. 75-1206

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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THE LEGAL AID SOCIETY,
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PAGINATION AS IN ORIGINAL COPY

JUDGE CAMPBELL

75 CRIM. 209

TITLE OF CASE

THE UNITED STATES

U.S.

WILLIE WILLIAMS

ATTORNEYS

For U. S.:

Frederico E. Virella AUSA
791-1950

For Defendant:

(One Count)

DATE	PROCEEDINGS
2-28-75	Filed indictment.
3-4-75	Deft. present (Atty. present) enters a plea of Not Guilty, 10 days for motions. Bail pre-fixed by the Magistrate at \$25,000 cash or surety continued. Deft. remanded in lieu of bail. Lasker, J. Case assigned to Cannella, J. for all purposes.
4-18-75	Deft. (Atty. present) Hearing begun on motion to suppress
4-21-75	Hearing cont'd and concluded.. Motion to suppress is denied.. Cannella, J. Trial begun with jury
4-22-75	Trial cont'd.
4-23-75	Trial cont'd. and concluded... Deft. GUILTY.. P.S.I. ordered sentence 5-28-75 at 2 P.M. Rm. 1306... Deft Remanded..... Cannella, J....
4-24-75	Filed Government's Request To Charge.

~~CONTINUED~~

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

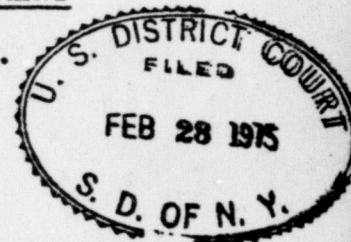
WILLIE WILLIAMS,

Defendant.

75 CRIM. 205

: INDICTMENT

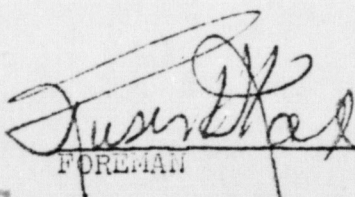
: 75 Cr.

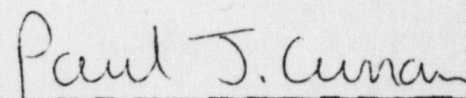


The Grand Jury charges:

On or about the 18th day of February, 1975, in the Southern District of New York, WILLIE WILLIAMS, the defendant, unlawfully, wilfully, and knowingly, by force, violence and by intimidation, did attempt to take, from the person and presence of another, money, property and other things of value, which belonged to, and was in the care, custody, control, management and possession of, The Manufacturer's Hanover Trust Co., 350 Park Avenue, New York, New York, a bank the deposits of which were then and there insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Section 2113(a).)


FOREMAN


PAUL J. CURRAN
United States Attorney

United States District Court
 SOUTHERN DISTRICT OF NEW YORK
 THE UNITED STATES OF AMERICA

vs.

WILLIE WILLIAMS,
 Defendant.

INDICTMENT

In violation of Title 18, United States Code, Section 2113(a).

PAUL J. CURRAN

United States Attorney

A TRUE BILL

John D. [Signature]
 Foreman

FEB 28 1975
 S. D. OF N. Y.
 DISTRICT CLERK

3/4/75 Dep. p. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Sealed

18 APR 1975 - DEFT. (ATTY. PRESENT) *ATTORNEY BEGON*
 ON MOTION TO SUPPRESS —

APR 21 1975 - *PLAINT CONTINUED* *AND (inc. v. d. e.)*
 MOTION TO SUPPRESS IS DENIED
CHANCELLER

APR 22 1975 - *TRIAL CONTINUED*

APR 23 1975 - *TRIAL CONTINUED* *AND (inc. v. d. e.)*
TRIAL VERDICT - DEFT. GUILTY -
DEFT. FOLLOWS
PSI ORDERED - SENT. ON 5-28-75
2 PM E. 1306

Remanded

AUSA FLANNERY, III

MAY 28 1975

DEPT WILLIE WILLIAMS - (ATTY PRESENT) *WITH GUARANTEE (LEGAL A.D.)*
 SENTENCED TO FIVE (5) YEARS AT A PLACE OF CONFINEMENT
 TO BE DESIGNATED BY THE ATTORNEY GENERAL OF THE U.S.
 DEFT. WAIVES OF ITS RIGHTS *(Remanded)*
TO APPEAL. *(Remanded)*

2 UNITED STATES OF AMERICA

3 vs.

4 WILLIE WILLIAMS

5 CHARGE OF THE COURT

6 (Cannella, J.)

7 THE COURT: Members of the jury, we have now come
8 to the next to the last stage of the case wherein I give
9 to you what is called the Judge's charge. I want to thank
10 you at this time for the careful attention you have paid
11 to this case. It's been a very short case comparatively
12 speaking but as the parties have indicated to you it is
13 a very important case. It is important not only to the
14 defendant in the case but also to the government and to the
15 public at large. This is a condition which exists in our
16 society and it is an important factor in our lives. I am not
17 going to go into the facts to any great extent because both
18 lawyers have covered the facts very carefully and actually
19 with this blackboard that is on here and the attention you
20 have paid to it, I am sure that you are more aware of the
21 facts than I really am. But in any event, whenever I do
22 mention facts and any time that the lawyers mention the
23 facts, keep in mind that it is not our recollection
24 of the facts that count, rather, it is yours. You are
25 the sole and sovereign judges of the facts in this case.
You are also the sole and sovereign judges of the credibility.

of the witnesses who have come here and of the evidence that has been produced here.

You essentially are the fact finders in this case. The case started with the indictment by the grand jury of this defendant for this alleged robbery. He pleaded not guilty to this charge and therefore he put in issue every material fact in the case. As a result of this we have this trial. Although you are the sole judges of the facts, the law you must accept from the court and apply it to the facts.

I recall when some civil jurors told me they never sat in a criminal case I told them the law is different in this case, are you prepared to take the law and those jurors said yes and I am sure all of you will do the same thing. You must take the law in the case and apply it to the facts as you find them.

Under our society a man is presumed innocent unless and until he is proven guilty by the credible evidence beyond a reasonable doubt. That is the general proposition of law. And the presumption of innocence remains with the defendant throughout the trial. He need do nothing.

You recall I told you he doesn't have to produce any evidence, he doesn't have to produce any witnesses, he doesn't have to take the stand and the fact that he

1
2 doesn't take the stand may not be used against him. You may
3 not presume or infer guilt as a result of that action.
4 He has the right to do that. The tool which the parties
5 use to prove a fact is called evidence. Evidence may be
6 described in a number of ways. The first description
7 I will give is by way of quality and quantity.

8 The quality of the evidence must be credible
9 evidence. That means it must be believable. The quantity
10 of the evidence, the amount, must be beyond a reasonable
11 doubt. Beyond a reasonable doubt actually defines itself.
12 A reasonable doubt means a doubt that is based on reason
13 and must be a substantial rather than a speculative doubt.
14 It must be sufficient to cause a reasonably prudent person
15 to hesitate to act in the more important affairs of his
16 life. Such a doubt can arise from evidence which is
17 produced or from the lack of evidence.

18 Evidence can also be described another way. The
19 first division would be the testimony, testimonial evidence.
20 That means a witness comes here, is sworn, and he tells
21 you under oath what he knows and what he has learned by
22 the use of his senses. That includes any natural inferences
23 that flow from that as well as anything that is brought
24 out on cross-examination, or any time that he is on the
25 stand and testifying. In addition to that we have exhibits,

2 and there are a number of exhibits in the case. You will
3 consider them as evidence in the case. Stipulations are
4 also evidence. I don't recall any specific stipulation,
5 although there was some mention of a stipulation which
6 really was nothing I recall, though. But in any event
7 if there were any stipulations in the case they are also
8 evidence.

9 The last subdivision in describing evidence in
10 this fashion we call judicial notice. There are many things
11 that are so well known that the court does not require
12 proof of them. One of the things of which I take judicial
13 notice in this case is that the Manufacturers Hanover
14 Trust Company which has a branch on 52nd Street and
15 Park Avenue is within the Southern District of New York
16 and therefore I have the right as a judge in this district
17 to hear it and you as a juror in this district have a right
18 to hear this case.

19 The last way that we sometimes subdivide evidence
20 is called the distinction between direct evidence and
21 circumstantial evidence. Direct evidence of course is
22 such evidence as is produced by way of a man who comes
23 to court or a person whocomes to court and tells you what
24 they have learned through the use of their senses, a so-'
25 called eyewitness. Circumstantial evidence is proof of the

chain of facts and circumstances indicating the guilt or the innocence of the defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It only requires that you after weighing the evidence must be convinced of the guilt of the defendant beyond a reasonable doubt before you may convict him.

Circumstantial evidence, we live by it day by day. If we were only to use direct evidence in our lives we would never get any place. Especially in situations where you are trying to determine what is a person doing as a result of his mental operations. You can't see that, any more than he can see the wind or the air. But when you observe a person and see him do certain things, you come to the conclusion as a result of circumstantial evidence that something is happening. Robinson Crusoe when he found the footprint on the island, although he never saw the man, was able to conclude because of that circumstance that there was another person on the island. Circumstantial evidence. When you go down to the subway and you wait for the train, you don't see the train coming down the track but you know from other days and other things that have happened to you that train will eventually come down the track. That is what we mean by circumstantial evidence.

2 I recall, for example, that one time in this town
3 that Joe Louis knocked out Schmeling. It was the second
4 fight. He had lost the first fight, unfortunately. And
5 in the second fight a little fellow that bought a ticket
6 to go and see this, and he got a front row ticket. He
7 came a little bit late there were a lot of people around
8 and he walked into where his seat was near the ringside,
9 about three or four seats. As he said, he noticed that
10 Joe Louis was in one corner and Schmeling was in the other
11 and the referee was there and he heard a bell and he
12 saw two of them start to walk toward the center of the ring
13 and he walked toward his seat. And the people all stood
14 up. And as he walked along, he couldn't see any more. He
15 kept walking and people kept shouting. Then when he finally
16 got up, Schmeling was lying on the floor cold as a mackerel,
17 to use an expression. And Louis standing there with his
18 hand elevated, the victor. Those of you who are old enough
19 to remember, Jimmy Walker said at that time that Joe Louis
20 laid a red rose on the tomb of Lincoln as a result of this win.
21 It took about 16 seconds for him to win this fight. The
22 punch traveled about 10 or 12 inches. Many of them never
23 saw the punch at all. The little fellow when he walked out
24 of that fight, having spent a hundred dollars and only
25 heard the crowd and having seen only what he saw, but do you

1 think if a person said to him, did Joe Louis knock out
2 Schmeling? If he had to depend on direct evidence, he
3 couldn't say that because he didn't actually see the punch
4 land. But he certainly from the circumstantial evidence
5 in the case could say, Joe Louis knocked out Schemling.
6

7 Circumstantial evidence has another thing
8 attached to it. It is a result of a chain of events, right.
9 If you take a stick and break it, you can easily do it
10 if you have a small twig and you take two twigs, a little
11 harder because you can still do it. You get to a point
12 where you multiply these sticks, you can't do it any more.
13 That is what circumstantial evidence works like to some
14 degree.

15 ^{it}
16 If you have one little fact/maybe not enough,
17 but if you have two or three you get to the point where
18 you say, this does satisfy. From the circumstances in
19 this case you are going to have to determine, for example,
20 was the identity proven. You are going to have to determine,
21 for example, was she in fact intimidated. Talking about
22 intimidation, which I will go into later reminds me of some
23 of the expressions Flip Wilson used, the kickor and the
24 kickee. Here we have an intimidator and intimidatee. The
25 intimidator is the alleged bank robber in this trial
He came in with the note. He knows what was written on this.

1 She, on the other hand was on the other side of the fence.
2
3 What does she think was going on? Ordinary people don't
4 just come in and ask for money without any authority.
5 It certainly crossed her mind that she was being robbed.
6 The ordinary person, how would he feel in that position.
7 She ducked down, she cried, she did a lot of things.
8 Consider all the circumstances and you will from the
9 circumstantial and direct evidence in this case decide
10 whether in fact she was intimidated.

11 Getting back to my discussion on evidence, what
12 is not evidence? The indictment in this case is not
13 evidence. It is only evidence of one thing, that the grand
14 jury acted and they made an accusation and the defendant
15 denies it. That is all it is evidence of. Questions
16 which were asked which were not answered. The facts that
17 are contained in the question, unless they are proven to
18 your satisfaction later on are not evidence.

19 Very simple example. Suppose somebody were
20 to ask me, when did you stop beating your wife. Well, there
21 is no evidence, number 1, that I have a wife. There is no
22 evidence -- oh, yes, there is. I told you about the toast
23 the other day. But there is no evidence that I ever beat her.
24 So wait until the evidence comes in. Don't be satisfied
25 by the question alone. That is not evidence. Matters

1 which were stricken from the record you may not consider
2 as evidence. Some of the matters were and you will disregard
3 them. Of course, this is a little humorous in a way
4 because the old story they tell about the little boy,
5 go into the corner and don't you think about the white
6 elephant and the first thing he does he goes down and thinks
7 of a great big white elephant. Telling you to disregard
8 evidence is something like that too. But you are grown people,
9 you are adults, you are intelligent and you must follow
10 the directions of the court. You may not consider any
11 evidence which the court has stricken.
12

13 Lastly I would call your attention to the fact
14 that there are some exhibits which have not been marked
15 in evidence and which have been referred to during the
16 course of the trial. You may not speculate upon what
17 it is in those exhibits, only what is evidence. If the
18 exhibit is marked in evidence, you can look at it. The
19 photographs, for example, you can look at those. Some
20 paragraphs were marked, you can look at those. Some were
21 not marked, you may not speculate upon those. Those are not
22 in evidence. Some statements were referred to which are
23 not in evidence, you may not speculate or guess what is
24 on those statements. Only what you hear and what has been
25 admitted into evidence. Any questions that I asked or

2 any rulings that I made during the course of the trial
3 are not to influence you one way or another because they
4 are matters of law and they don't concern your function
5 at all. How do you evaluate the evidence, how do you find
6 out where the truth lies? It would be very lovely if we
7 could use an IBM machine capable of doing this, although
8 then of course you wouldn't be here. You have to use those
9 same norms and standards which have been used by Anglo-
10 American juries for many centuries.

11 The first is the demeanor of the witnesses.
12 One of the lawyers referred to it in much more detail than
13 I intend to refer to it. Because observing the demeanor
14 of the witness depends on your own subjective feeling.
15 What do you get out of looking at somebody? The Fuller
16 Brush man comes to you and says hey I got brush here, you
17 look him over and you say I don't know, the company is
18 pretty good, he looks reasonably clean, he is probably
19 telling the truth, you will speak to him. What I am
20 saying is, you observe each witness, you look at him,
21 and you make up your own mind as to how much of his testimony
22 you will believe. You should use your common sense. That
23 is a requirement for a jury. You are to use that same
24 fine judgment in the jury room as you do in your everyday
25 life in matters of great importance to you.

2 The next thing that you would look into would be the
3 interest of the witness. What inerest does he have. The
4 FBI men are employed by the government and they have a job,
5 et cetera, in the light of their duties, and whatnot, you
6 will look into their interest. The bank employees, they had
7 no pecuniary interest in this case. They came here, they
8 are employees, two of them were mailmen, one is a teller, the
9 other is the head teller. And the man who brought the certifi-
10 cate down. Look into their backgrounds and determine what
11 interest they have. Whatever witness you are looking into,
12 determine what interest he had in the case and in the light of
13 that interest you make a judgment as to how much of his testi-
14 mony you believe. ~~The~~ The testimony of a witness may be impeached
15 by showing that he previously made a statement which is incon-
16 sistent with his present testimony.

17 The earlier contradictory statements are admissible
18 only to impeach the credibility of the witness and do not
19 establish the truth of these statements. It is your province
20 to determine the credibility, if any, to be given to the
21 testimony of a witness who has been impeached. And your
22 attention was brought to certain discrepancies here and you
23 will judge that witness' testimony in the light of that.
24 Of course there is this to be said. Sometimes you hear
25

arguments on all sides. If for example every witness says the same thing, then this is all hand tailored. Everybody was brought in, they all were told to say the same thing, they all said the same thing. You bring them in and they say something different, well, why don't they say the same thing. You can't win. It is an honest choice. But you have a choice in this matter and it is very simple. You exercise your own judgment. You exercise your own opinion and your own reasoning as to the truth of what these witnesses have said and you find that portion of it that you believe to be true. If you believe any witness has testified falsely to any material fact you must disregard that portion of the testimony which is false.

On the other hand, you may accept part of it and not believe part of it, or you may disbelieve the entire testimony. There are some women on the jury here, and I would explain this rule in this fashion: if you make an omelet, you say you are using four or five eggs and one of the eggs is bad, no one in the family winds up eating that omelet, you throw away the whole thing, but one egg has contaminated the whole thing.

On the other hand, if you burn a piece of toast, then if you do what happens in my family, you scrape of the burned part and I have to eat it. So you retain the

part that you think is still good. There was some statement here, there was some aspect here of what is called exculpatory statements. That is a fancy word which means making a statement which indicates that you are not guilty of a crime. This is an exculpatory statement. An exculpatory statement made by the defendant, in this area there is really two of them that have been referred to or that could be considered as exculpatory statements.

The first one was when they caught up with him at 52nd Street and the door and he said not me, I wasn't in the bank, or something to that effect. And then the other one is when he was in the FBI office and they were fingerprinting him, he said I went into the bank but I only went in to change a dollar. By the way, if that is a fact, where is the change to the dollar. How did he wind up with the bill out on 52nd Street if he went in to change a dollar as he said he did. Because he still had the dollar when they picked him up.

In any event, those are in the nature of exculpatory statements. If you believe they are false, then you may determine that the defendant has consciousness of guilt and he knows that he did something wrong and that he is using this statement to exonerate himself and possibly get off. That is a judgment for you to make, and you do that in

2 evaluating the evidence.

3 In reference to the identification problem here,
4 the government has the burden of proving to your satis-
5 faction by credible evidence beyond a reasonable doubt
6 that the defendant was the man who approached Miss Rosa
7 and passed the note to her. She's described what's
8 happened and Penny Vidiakitis described what she saw and
9 how she followed the alleged perpetrator step by step
10 while he walked west on 52nd Street.

11 Mahon and Stewart have described what they
12 observed and what they did.

13 The defendant by his plea of not guilty denies
14 that he was involved in the attempted robbery. I instruct
15 you to carefully examine all the testimony in this regard.
16 What opportunity did the particular witness have to observe
17 the alleged robber? What were the lighting conditions
18 in the area? The artificial light in the bank? The
19 weather conditions on the outside? You have heard testimony
20 that the windows in the bank extended one foot from the
21 floor to the ceiling all around the bank. Examine the
22 testimony of each witness and the physical surroundings.
23 Examine the age and background and capacity of each witness
24 to observe. None of the witnesses knew the accused before
25 the incident. They later saw pictures of him. The

surveillance photograph and the so-called mug shot.

Are you satisfied that the identification of the defendant made at the trial by the particular witness then under discussion was his or her own independent recollection as of the time that the incident occurred? Or was it the result of pictures shown to that witness after the incident on March 17th or prior thereto? How positive was the witness when making the identification in court? As to Rosa, for example, she said she saw him first at the counter face to face at the time the alleged incident happened and she also saw him while she was seated at that desk.

Stewart indicated he saw him while he was waiting on line and that immediately he chased after him and saw him, apprehended him either 1 or 20 feet from 52nd Street door from the bank and that he returned with him to the bank and he saw him while he was talking to Rosa while she made an identification. And then he saw him while he was waiting with the defendant at the spot marked X at Government's Exhibit 4 while they are waiting there for the police to arrive. Mahon said he saw him while he was on line. And then he saw him as the alleged perpetrator left, turning his head, in his direction as he was going out and the surveillance photograph shows that scene. Then he saw him again after he chased him up the street,

and he thinks it was about 150 feet from the door on the 52nd Street side. And then he saw him while Rosa was seated at the desk and she identified him again -- she identified him at that time, rather, and he also saw him at that area marked X on the photograph. Penny Vidiakitis said she saw him when she walked step by step at the window writing the description, and then she was at the desk consoling Rosa when they brought him back.

All of the witnesses except Vidiakitis saw photographs, surveillance photographs or mug shots, two of them did and one did not, on March 17th. So that it is your obligation in this area to examine the evidence. That includes everything that was in evidence. The totality of it. Including the pictures, it includes, if you accept as voluntary the statement which I will explain to you in a minute, that he made to McHale at the FBI headquarters that I was in the bank but I was only there to change a dollar. It includes all the totality of the evidence in the case. The burden of proof is on the government with reference to every element of the crime as it is with this element, that is, to satisfy you beyond a reasonable doubt. There are certain definite sections in this case which are important to you because the indictment contains these words and you will have to understand them.

1 elh
2 The first three that come in order as you read the
3 indictment are unlawful, wilful and knowing. That is how
4 the defendant must act in this case, in this fashion.
5 What does unlawful mean in this context? It means against
6 the law. What particular law are we talking about. We
7 are talking about a section which has been designated
8 by Congress as Title 18, United States Code, 2113,
9 subdivision A, and the defendant need not know that
10 section by number. And it is a federal law which makes
11 it a crime to attempt to rob a bank which is insured by
12 the Federal Deposit Insurance Corporation. So that is the
13 law we are talking about.

14 What do we mean by knowingly? Knowingly means
15 to act voluntarily and intentionally and not because of
16 mistake, inadvertence or accident or some other innocent
17 reason.

18 Wilfully, which is the third word, means to act
19 knowingly, deliberately and with a bad motive or purpose.
20 But it is not necessary that the defendant know that he
21 is breaking any particular law. This particular expression,
22 wilfulness is really the basis for why we have any
23 responsibility at all. If we didn't have will power then
24 there wouldn't be any responsibility, we'd just be like
25 an inanimate object. Every time you pick a glass up and

1 elh

2 elh

3 let it go, it must drop. A human being is not like that.
4 Here is a glass of water. If I will it, I can pick up that.
5 glass of water and drink it. If I don't, I don't. Here
6 we have a choice. A man is responsible for his conduct
7 under our system of law. To act wilfully you must do
8 something freely and voluntarily. You must do it in what
9 the Romans call mens rea, mens mind, and rea evil. Evil
10 intent, bad motive. And that is how you must act before
11 you can be responsible for a crime.

12 Specific intent has the same kind of element
13 in it. The crime charged in this indictment requires
14 proof of specific intent before the defendant can be
15 convicted. To establish specific intent the government
16 must prove that the defendant knowingly did an act which
17 the law forbids, purposely intending to violate the law.
18 Such an intent may be determined from all the facts and
19 circumstances surrounding the case by either direct evidence
20 or circumstantial evidence or both. What do we mean by an
21 attempt, because there is no doubt here and all the parties
22 agree that the robbery was not consummated.

23 To attempt an offense means to wilfully
24 do some act in an effort to bring about or to accomplish
25 something the law forbids to be done. In short to
wilfully try to do something illegal. An act is done

1 wilfully if it is done voluntary and intentionally as
2 I have explained to you before. So an attempt is a try
3 in effect which does not succeed. What do we mean, there
4 is an expression in here, possession of the bank. Namely
5 that the money was in the possession of the bank. Possession
6 can be described in this fashion: actual possession where
7 you physically hold something, for example, like I am holding
8 this card. Or constructive possession. Constructive
9 possession is although a person does not actually have
10 something in his actual possession he both has the power
11 and the ability to exercise dominion and control over
12 something. Either directly or through another person. And
13 in this particular case of course the bank has constructive
14 possession of the money even though the corporation
15 as such is an artificial person and therefore must act
16 through people. So there is no such thing as the bank
17 literally holding money in its possession but through
18 its agents who exercise dominion and control over it, that
19 would be possession.
20

21 That is the definition of possession in this
22 particular case.

23 The next thing which we come to is the indictment.
24 And the indictment is a very simple one, it is really
25 only a very few lines. And you must find all these elements

1 that I am reading to you now by credible evidence beyond
2 a reasonable doubt which have been proven by the government
3 before you may convict this defendant, so that you must
4 find in this case that it happened on or about the 18th
5 day of February, 1975. And I don't think that there is much
6 dispute about that. There's been no contradictory evidence
7 that I am aware of that this did not happen on the 18th
8 of February, 1975. in the Southern District of New York.

9 And of course I told you that I took judicial
10 notice that we are in the Southern District of New York.
11 You will consider this. It says unlawfully, wilfully and
12 knowingly, and here again I have just defined those words
13 for you. Very simply put it means that it must be a
14 crime against the federal law, it must be done voluntarily
15 and freely, not because of mistake or inadvertence or
16 in good faith and it must be done with an evil intention,
17 a bad mind, a bad motive. By force and violence and by
18 intimidation.

19 Both sides have agreed that force and violence
20 are not involved here and we are talking about intimidation.
21 I have already described to you what intimidation is. It
22 comes from a Latin word timidous which means to make timid.
23 To intimidate means to put somebody in fear of a thing.
24 That is what it actually means. That is what that word
25

1 means and that is the judgment you will have to make in
2 this case whether or not in fact Miss Rosa was intimated.
3 The evidence, all the evidence must be considered by you
4 and then you will make a judgment in that regard. The
5 attempt, and here again I told you that means to try,
6 without really accomplishing the purpose, to take from the
7 person and present of another, and of course Miss Rosa
8 was there, the other people were there, the teller
9 was there next to her, Miss Vidiakitis was at the other
10 side if you believe her testimony and there were people
11 standing in the well of the bank, so that those are persons
12 and that would satisfy you if in fact you find that to be
13 the case. It says money, and then it goes on to say a lot
14 of other things because we are involved with money here be-
15 cause that is what was spoken about and that is what she put
16 in the bag. Then it says about the care, custody, control,
17 management, possession of the Manufacturers Hanover Bank.
18 That is the possession I just told you about, it had to be
19 the bank's money in that they possessed it. Possession
20 has nothing to do with owning it. The Manufacturers Trust
21 Company might not have had interest in that money that was
22 their own interest, it might have been all depositors' money,
23 but it doesn't make a difference who owns the money,
24 it was a question of who had possession of the money. And
25

that the deposits were then and there insured by the Federal Deposit Insurance Corporation. And of course you saw the certificate. So that is the last element in this case: To summarize it then, in order to find the defendant guilty you must find each of the following elements to have been proven by the government by credible evidence beyond a reasonable doubt:

First, that on or about February 18th the Manufacturers Trust Company at 350 Park Avenue was a bank the deposits of which were insured by the Federal Deposit Insurance Corporation, and you have the certificate. Secondly, that on or about that date the defendant attempted to take the money from the bank which belonged to or was in the care of, custody, control or management of the bank. Third, that the defendant attempted to take the money from the person or presence of one or more persons other than the defendant.

Fourth, that in attempting to take the money, intimidation was used by the defendant, and lastly, that the defendant acted unlawfully, knowingly and voluntary. There are some areas of intimidation which I covered very sketchily and which I will go into because this is one of the areas that both of the lawyers spoke about. As to this fourth element of the charge, it must be through the

use of intimidation. Let me add a few words. The government is not required to show that force and violence were actually used against anyone if it proves beyond a reasonable doubt that in attempting to take the money -- attempting to take money, intimidation was used by the defendant. The words as I indicated to you earlier, intimidate derives from the Latin word timidous which means to make timid or fearful. In attempting to take, did the defendant intimidate the teller Rosa? To attempt to take by intimidation means wilfully to attempt to take by putting another person in fear of bodily harm. Did Williams put Miss Rosa in fear of bodily harm? Fear must arise from the wilful conduct of the accused, rather than from some mere temperamental timidity of the victim; however, the fear of the victim, here Miss Rosa, need not be so great as to result in terror, panic or hysteria. Intimidation must be established by proof of one or more acts or statements, of the accused which were done or made in such a way and under such circumstances as would produce in an ordinary person fear of bodily harm. Actual fear need not be proved. Fear, like intent, is a mental operation and may be inferred from what the accused does and says, as well as what the victim does and says and all other surrounding circumstances. The totality of the incident must be examined by you in making

1 elh
2 your determination of whether or not the government has
3 proved the use of intimidation in this case by credible
4 evidence beyond a reasonable doubt. So we have reached
5 the end of the case. Sympathy and bias have no part in
6 this case whatsoever. Punishment is not your concern. It
7 can't help you decide the facts at all. It would not make
8 any difference what the punishment is, it would not help
9 you a single bit in deciding what the facts are. If you
10 do go into that you are stultifying your oath as juror,
11 you swore to decide the facts as you hear them and
12 the law as given to you by the court.

13 Madam forelady, the decision of the jury must be
14 unanimous. There are only two possible verdicts in this case.
15 You will either find the defendant guilty as charged or
16 not guilty. The reporter very excellently has been taking
17 down every word that has been said in this case. If there
18 comes a time in this case when some of you may feel -- now
19 wait a minute, Mrs. Vidiakitis said she was standing at
20 the counter and somebody said no, she was sitting. All
21 right, that's a dispute, you can resolve that but someone
22 has that recollection and somebody else has another
23 recollection. All you will do is the forelady take a note,
24 write it out, "We would like the testimony of Mrs. Vidiakitis
25 read back," "We would like that portion where she testified

2 she was standing." Pinpoint it as much as possible. And
3 we will have the reporter find that part of the record
4 and it will be read to you. I have one last discussion with
5 the lawyers before you are excused.

6 (Side bar)

7 THE COURT: Any exceptions?

8 MR. GUTMAN: Yes, Judge. The part about where
9 you are damned if you do and you are damned if you don't,
10 I respectfully except to because I spoke at length about
11 the inconsistency. I think your comment tended to flatten
12 them out.

13 THE COURT: That is the reason I gave it, because
14 it seems to me that the jury should be invited to decide
15 their case on realities and not -- well, in any event you
16 have an exception.

17 MR. GUTMAN: The second one was your comment about
18 where is the change? He saw no teller. He kept the money
19 and walked out.

20 THE COURT: Who said that?

21 MR. GUTMAN: Nobody said he got the change.

22 THE COURT: He was in the bank but he went in
23 there to make change of a dollar.

24 MR. GUTMAN: And he never got it.

25 THE COURT: Your exception is noted.

MR. FLANNERY: I am not certain whether you mentioned the exhibits.

THE COURT: Yes, I said they should consider all the exhibits, only the ones that are in evidence and the note and all this. If they want the exhibit is it all right to bring them in, we will just let Joe bring them in instead of coming down.

MR. GUTMAN: We don't need you, because the lawyers--

THE COURT: I am talking about you and the clerk.

MR. GUTMAN: Sure.

MR. FLANNERY: There is unless a dispute.

(End of side bar)

THE COURT: I am in my 26th year as a judge and when I was on the bench about two or three years I once sent a jury out at 11 o'clock and about 5 o'clock nothing happened and I sent for them and I said madam forelady you have been in there about seven or eight hours, what is going on. And she said, your Honor, you told us not to discuss the case-- the point is, this is the time for discussion. Don't go in right away and say I feel this or that. Do a little thinking first, as much thinking as you need in accordance with your conscience. That is what you are required and that is what you should do. Miss

Thomson and Mr. O'Brien, I want to thank you very much. who was, Tennyson or somebody said they serve as well who stand and wait, or Robert Louis Stevenson. In any event, thank you just with the same force and effect as if you had rendered a verdict. Go down to room 109 and the jury clerk will give you further instructions.

(The two alternate jurors were discharged and left the courtroom.)

(At 12 noon a marshal was duly sworn.)

(At 12 noon the jury retired to deliberate.)

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(ED. 4-23-71)

GOVERNMENT'S

EXHIBIT

U. S. DIST. COURT
S. D. OF N. Y.

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AG

ALLEN-BALLLEY

Certificate of Service

July 16, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Jonathan Silberman